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IN THE
Supreme Court of the United States
October Term, 1984

SHELDON SANDERS,

Petitioner,

against

COMMISSIONER OF CORRECTIONS OF THE STATE
OF NEW YORK and ROBERT ABRAMS, ATTORNEY
GENERAL OF THE STATE OF NEW YORK,

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

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Counter Statement of the Question Presented

Does the federal constitutional right to counsel attach where a person has retained counsel in connection with a grand jury proceeding, but is not in custody and no adversary proceedings have commenced against him? The court below answered this question in the negative.



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Preliminary Statement

Sheldon Sanders petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit which, on May 17, 1984, affirmed a decision of the United States District Court for the Southern District of New York (Vincent L. Broderick, D.J.) denying his petition for a writ of habeas corpus. The petition sought an order vacating

a January 15, 1980, judgment of the New York State Supreme Court convicting petitioner after a jury trial of two counts of Bribery in the Second Degree and one count of Conspiracy in the Third Degree (New York Penal Law §§200.00, 105.05). Petitioner was sentenced to concurrent indeterminate terms of imprisonment of from one to three years on each of the two bribery counts, and to a concurrent ninety-day jail term on the conspiracy count. Petitioner has been released on parole.

Statement of the Case

The State Court Proceedings

In January, 1977, petitioner, an attorney, told his co-counsel in a litigation, Paul Goldberg, that he had paid \$250 to a court official to obtain a stay in a civil law suit. Goldberg promptly reported this information to the New York County District Attorney's office and, for the next few months, assisted that office in its investigation of corruption in the New York County Supreme Court. Specifically, Goldberg recorded all his conversations with petitioner and with Abram Brown, the corrupt court official, during which petitioner and Brown furthered their conspiracy to obtain favorable results in the lawsuit in return for payments to Brown. On three occasions in the course of his conversations with Goldberg, petitioner admitted on tape that he had paid Brown \$250 for the stay and acknowledged that he had been reimbursed by Goldberg in a check for half of that payment.

At the end of May, 1976, as the investigation of Brown's activities culminated, petitioner received a grand jury sub-

poena, which provoked two responses. First, petitioner retained counsel. Second, petitioner began a series of frantic attempts to speak to Goldberg, attempting to call him at his home, his office, and at other attorneys' offices. Goldberg avoided these calls for a week or so, and even called petitioner's lawyer, seeking to discourage petitioner from continuing his efforts to reach Goldberg. Finally, however, on June 9, Goldberg received a call from petitioner's secretary and gave her a telephone number where Goldberg could be reached. When petitioner called Goldberg at that number, they had a last conversation, which like all the earlier ones, was recorded. At the time of the final conversation between petitioner and Goldberg, petitioner was not in custody and no adversarial proceedings had commenced against him. In that last conversation on June 9, petitioner insisted that he and Goldberg should meet so that they would be "consistent" in the grand jury. When Goldberg, however, said he was going to tell the truth, petitioner finally agreed that he, too, would admit—as he had on three prior occasions—that he "had [had] a dealing" with Brown.

Petitioner was subsequently indicted for three counts of bribery and one count of conspiracy. One bribery count charged petitioner with paying money to Brown throughout the course of the conspiracy; a second bribery count concerned a \$100 payment to Brown during the course of the investigation; and a third concerned the \$250 payment petitioner made before the investigation began. Petitioner was convicted of the conspiracy count and two counts of bribery, and he was acquitted of the bribery count which charged him with paying Brown the \$250 bribe.

Petitioner appealed his conviction to the Appellate Division of the New York Supreme Court, which unanimously affirmed his conviction without opinion on April 9, 1981. 81 A.D.2d 520. On May 18, 1982, the New York Court of Appeals also affirmed petitioner's conviction. 56 N.Y.2d 51, 451 N.Y.S.2d 30. In its decision, the Court of Appeals found that the last telephone conversation between petitioner and Goldberg on June 9th had violated petitioner's state constitutional right to counsel, despite the fact that petitioner was not in custody and no adversarial proceedings had begun against him when the call was recorded. The court nevertheless held that the "overwhelming proof" of petitioner's guilt rendered the error harmless.

In June, 1982, petitioner filed a petition for a writ of habeas corpus in federal court, claiming that his federal constitutional right to counsel was violated by the use in evidence of the June 9th conversation. Judge Broderick denied that petition in a decision on February 2, 1984, and the Court of Appeals for the Second Circuit affirmed the district court's decision on May 17, 1984.

Petitioner seeks certiorari from this Court on the grounds that his federal constitutional rights to counsel and to due process were violated by the introduction into evidence of his June 9 conversation with Goldberg.

Reasons for Denying the Writ

This Court have made it clear that the federal constitutional right to counsel attaches only upon the commencement of adversary proceedings by way of a formal charge, preliminary hearing, indictment, information, or arraign-

ment. *Massiah v. United States*, 377 U.S. 201, 206 (1964); *Kirby v. Illinois*, 406 U.S. 682, 688-689 (1972); *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *Estelle v. Smith*, 451 U.S. 454, 469-470 (1981). Indeed, even if petitioner had been subpoenaed as the "target" of the grand jury investigation, "[n]o criminal proceeding [had] been instituted against him, hence the Sixth Amendment right to counsel [had] not come into play." *United States v. Mandujano*, 425 U.S. 564, 581 (1976).^{*} Moreover, that New York has interpreted its constitution in a different way is no reason for granting the writ.

Furthermore, there is no conflict in the circuits to resolve, and this Court has denied certiorari in a succession of cases in which federal courts have uniformly held that a suspect's federal right to counsel had not attached even though the suspect had retained a lawyer in connection with an investigation or a grand jury proceeding. *United States v. Mitlo*, 714 F.2d 294, 295, 296-297 (3rd Cir. 1983), *cert. denied*, 104 S. Ct. 550 (1983); *United States v. Sikora*, 635 F.2d 1175 (6th Cir. 1980), *cert. denied*, 449 U.S. 993, 1176-1177 (1980); *United States v. Ammar*, 714 F.2d 238, 260-261 (3rd Cir. 1983), *cert. denied*, 104 S. Ct. 344 (1983); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 165 (1983); *see also United States v. Dobbs*, 711 F.2d 84, 85 (8th Cir. 1983).

A rule such as the one urged by petitioner would cripple law enforcement, since it would encourage seasoned crim-

^{*} Without any citation to the record, petitioner refers to himself as the "subject" of the grand jury investigation (petitioner's brief at 5, 6, 19-20). In fact, it was Brown's activities which were the focus of the grand jury. *People v. Sanders*, 56 N.Y.2d at 66, 451 N.Y.S.2d at 37.

inals to invoke "house counsel" on retainer as a shield against necessary and legitimate covert investigations. See *United States v. Masullo*, 489 F.2d 217, 222-223 (2d Cir. 1973); *United States v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982); see also *United States v. Kenny*, 645 F.2d 1323, 1338 (9th Cir. 1981), *cert. denied*, 452 U.S. 920 (1981).

In sum, the court below followed the rule established by this Court, and the federal constitution plainly does not bar the use of statements made by someone not in custody and against whom no adversary proceedings have begun, simply because he has retained counsel in connection with an investigation or a grand jury proceeding.

Conclusion

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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August, 1984

